CIMB Bank Bhd v Suppiah a/l S Govindasamy & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(A)-842–07 OF 2020
HASHIM HAMZAH, MOHAMED ZAINI MAZLAN AND WONG KIAN KHEONG JJCA
14 JANUARY 2025

Land Law — Charge — Third-party charge — Appellant sought order for sale of lots of land to recover outstanding debts from developer, following developer's default and chargors' failure to remedy breach of third-party charge — Whether interveners were estopped from resisting order for sale application based on invalidity of third-party charge — Whether appellant required to obtain Attorney General's written consent under s 9(1) and (2) of Government Proceedings Act 1956 before execution and registration of third-party charge — Whether chargors had power and capacity to charge land — Whether appellant was 'party or privy' to fraud of chargors and developer — Whether interveners had proven 'cause to the contrary' in s 256(3) of National Land Code

By an indenture, a public, religious and charitable trust over three lots of land was created for the benefit of the Hindu Community of Jelutong. The three lots were managed by a Hindu Temple Committee and a Hindu temple was built on one of the lots while the other two lots were used as a Hindu burial ground ('the two burial lots'). S Muthiah a/l Vellasamy ('Muthiah') was the sole surviving trustee of the trust. Muthiah refused to cooperate with the Committee and secretly obtained a High Court order to appoint Subramaniam a/l Muthusamy ('Subramaniam') as a co-trustee of the trust. Muthiah passed on and without the Committee's knowledge, Subramaniam applied to the High Court for an order to appoint Subramaniam's wife, Lalidah a/p Sinnasamy ie the second respondent ('second defendant'), as a co-trustee of the trust. The Attorney General ('AG') consented pursuant to s 9(1) of the Government Proceedings Act 1956 ('the GPA') to the application of Subramaniam and the second defendant ('the chargors') to the High Court for leave to develop the three lots of land. Following this consent, the chargors filed an originating summons and the High Court granted the leave. The chargors entered a joint venture agreement with Sumita Development Sdn Bhd ('the developer'), which they owned 60% of the shares and were its directors. The developer obtained an overdraft facility and a bridging loan from the appellant ('plaintiff'), secured by a third-party charge over the two burial lots. The chargors had also successfully applied to the Registrar of Titles of Penang to sub-divide the two burial lots into 17 lots of land. In April 2014, a police report was filed by the secretary of the Committee regarding the breach of trust by the chargors. In Suit No 43, five beneficiaries of the Hindu Community of

Jelutong sued the chargors and developer alleging a breach of trust and the improper registration of the third-party charge. The High Court in allowing Suit No 43 found, inter alia, that the chargors had breached the trust and the AG's consent was obtained through concealment. Subramaniam died in April 2017 and the plaintiff obtained an order of the High Court to appoint the first respondent ('first defendant') as the administrator of the estate of Subramaniam. The developer subsequently defaulted in the repayment of the overdraft facility. The plaintiff issued three notices, eventually terminating the banking facilities and demanded the developer to pay the then outstanding sum due and owing by the developer to the plaintiff. A further demand was made on the chargors. The chargors did not accede to the demand ('breach of the third-party charge'), resulting to a Form 16D notice. The chargors however failed to remedy the breach of the third-party charge ('chargor's non-compliance of Form 16D'), causing the plaintiff to file an originating summons in the High Court seeking for an order for sale of the 17 lots ('the charge action'). One of the five plaintiffs in Suit No 43 had passed on; the remaining four successfully intervened in the charge action ('the interveners'). The learned High Court judge ('HCJ') dismissed the plaintiff's charge action and hence this appeal. The issues for consideration were: (a) whether the interveners were estopped from resisting the charge action based on the invalidity of the third-party charge; (b) whether the plaintiff was required to obtain AG's written consent under s 9(1) and (2) of the GPA before the execution and registration of the third-party charge; (c) whether the chargors had the power and capacity to charge the two burial lots, (d) whether the plaintiff was a 'party or privy' to the fraud of the chargors and developer; and (e) whether the interveners had proven 'cause to the contrary' in s 256(3) of the National Land Code ('the NLC').

Held, allowing the appeal:

(1) The interveners were now estopped from opposing the charge action on the ground that the third-party charge was void as the plaintiffs in Suit No 43 had elected to claim only from the chargors and developer in Suit No 43 in respect of the third-party charge and not to claim that the third-party charge was invalid. 'Estoppel by conduct and election' had been raised on the part of the interveners. The failure of the HCJ to consider the application of estoppel constituted an error of law wherein appellate intervention was warranted (see paras 38 & 40).

(2) The construction of s 9(1) and (2) of the GPA was a question of law. The plaintiff was not required by s 9(1) and (2) of the GPA to obtain the AG's written permission before the execution and registration of the third-party charge because the execution and registration of the third-party charge did not concern the two rights of s 9(1) of the GPA, namely: (a) the plaintiff did not file a suit regarding the breach of the trust in this case; (b) the plaintiff did not institute a suit to seek for directions

of the court which were deemed necessary for the trust; and (c) the plaintiff did not apply to court to join as a party in any existing suit on behalf of the Government or public with regard to the trust. Additionally, the execution and registration of the third-party charge was not based on any one of the purposes stipulated in s 9(1)(a) to (i) of the GPA. The HCJ had erred in law in requiring the plaintiff to obtain the AG's written consent under s 9(1) of the GPA before the charge action was instituted (see paras 44–46).

(3) The chargors had the power and capacity to charge the two burial lots under s 92(2)(c) read with s 241(1) of the NLC. Section 21(1) of the Trustee Act 1949 ('the TA') did not apply because the chargors, as co-trustees of the trust, were not authorised by the indenture or law to 'pay or apply capital money subject to the trust for any purpose or in any manner'. Consequently, there could not be any room for the interveners to rely on s 21(2) of the TA to resist the appeal. Section 22 of the TA was a provision which was independent of s 21(2) of the TA and thus s 21(2) of the TA could not constitute a 'prohibition or limitation' on the chargors' power to charge land within the meaning of s 241(3)(a) of the NLC. Consequently, the registered third-party charge was indefeasible pursuant to s 340(1) of the NLC as the registration of the third-party charge had not been obtained 'by means of an insufficient or void instrument' as understood in s 340(2)(b) of the NLC. An error of law was committed by the HCJ when it was decided that the chargors had no capacity to execute and register the third-party charge in favour of the plaintiff (see paras 48 & 50–51).

(4) The plaintiff's actual notice or knowledge of the existence of the trust; of the fact that the two burial lots were part of the subject matter of the trust; and that the chargors were co-trustees of the trust, could not be tantamount to the plaintiff's actual notice or knowledge of the fraud of the chargors and developer before the execution and registration of the third-party charge. The phrase 'party or privy' in s 340(2)(a) of the NLC could not include constructive notice or knowledge of the fraud in question and thus the interveners could not rely on constructive notice or knowledge to oppose the appeal. Consequently, the HCJ erred in law in deciding that the plaintiff had not exercised due diligence to ascertain the status of the subject matter of the third-party charge before the registration of the third-party charge. The negligence of the plaintiff, if any, could not be tantamount to the fact that the plaintiff was 'party or privy' to the fraud. The plaintiff had also relied on the professional services and advice of the plaintiff's solicitors and hence the plaintiff was not negligent (see paras 55–57 & 59–60).

(5) Since: (a) the third-party charge was valid and indefeasible under s 340(1) of the NLC; (b) the breach of third-party charge had occurred; (c) the

plaintiff had served Form 16D on the chargors and there was no dispute regarding the chargors' non-compliance of Form 16D; and (d) the charge action complied with O 83 of the Rules of Court 2012, the chargors and interveners had the legal and evidential burden to satisfy the court of the existence of 'cause to the contrary' in s 256(3) of the NLC. The court could not dismiss a charge action under s 256(3) of the NLC on the ground of public policy and/or unjust enrichment. The HCJ fell into error in deciding that the third-party charge was contrary to public policy. An order for sale of the 17 lots was not contrary to any rule of law and/or equity (see paras 63 & 65–67).

[Bahasa Malaysia summary

Dengan satu indentur, satu amanah awam, keagamaan dan kebajikan telah diwujudkan ke atas tiga lot tanah untuk manfaat Komuniti Hindu Jelutong. Tiga lot tersebut diuruskan oleh Jawatankuasa Kuil Hindu dan sebuah kuil Hindu dibina di salah satu lot tersebut, manakala dua lot yang lain digunakan sebagai tanah perkuburan Hindu ('dua lot perkuburan'). S Muthiah a/l Vellasamy ('Muthiah') adalah pemegang amanah tunggal yang masih hidup. Muthiah enggan bekerjasama dengan Jawatankuasa dan secara rahsia memperoleh perintah Mahkamah Tinggi untuk melantik Subramaniam a/l Muthusamy ('Subramaniam') sebagai pemegang amanah bersama. Muthiah telah meninggal dunia dan tanpa pengetahuan Jawatankuasa, Subramaniam memohon kepada Mahkamah Tinggi untuk mendapatkan perintah melantik isteri Subramaniam, Lalidah a/p Sinnasamy iaitu responden kedua ('defendan kedua') sebagai pemegang amanah bersama amanah tersebut. Peguam Negara ('PN') memberikan persetujuan menurut s 9(1) Akta Prosiding Kerajaan 1956 ('APK') untuk permohonan Subramaniam dan defendan kedua ('pencagar') kepada Mahkamah Tinggi untuk mendapatkan kebenaran membangunkan tiga lot tanah tersebut. Setelah kebenaran ini, penjamin memfailkan saman pemula dan Mahkamah Tinggi memberikan kebenaran. Pencagar menandatangani perjanjian usaha sama dengan Sumita Development Sdn Bhd ('pemaju'), di mana mereka memiliki 60% saham dan merupakan pengarahnya. Pemaju memperoleh kemudahan overdraf dan pinjaman penyambung daripada perayu ('plaintif'), yang dijamin dengan cagaran pihak ketiga ke atas dua lot perkuburan tersebut. Pencagar juga telah berjaya memohon kepada Pendaftar Hakmilik Pulau Pinang untuk membahagikan dua lot perkuburan tersebut kepada 17 lot tanah. Pada April 2014, satu laporan polis telah dibuat oleh setiausaha Jawatankuasa mengenai pelanggaran amanah oleh pencagar. Dalam Saman No 43, lima benefisiari Komuniti Hindu Jelutong telah menyaman pencagar dan pemaju atas dakwaan pelanggaran amanah dan pendaftaran cagaran pihak ketiga yang salah. Mahkamah Tinggi dalam membenarkan Saman No 43 mendapati, antara lainnya, bahawa pencagar telah melanggar amanah dan persetujuan PN telah diperoleh melalui penyembunyian. Subramaniam meninggal dunia pada April 2017 dan plaintif memperoleh perintah Mahkamah Tinggi untuk melantik responden pertama

('defendan pertama') sebagai pentadbir harta pusaka Subramaniam. Pemaju kemudian telah gagal dalam pembayaran kemudahan overdraf. Plaintif mengeluarkan tiga notis, akhirnya menamatkan kemudahan perbankan dan menuntut pemaju untuk membayar jumlah yang tertunggak pada masa itu yang terhutang oleh pemaju kepada plaintif. Satu tuntutan lanjut telah dibuat ke atas pencagar. Pencagar tidak memenuhi tuntutan tersebut ('pelanggaran cagaran pihak ketiga'), mengakibatkan satu notis Borang 16D. Walau bagaimanapun, pencagar gagal untuk membetulkan pelanggaran cagaran pihak ketiga ('ketidakpatuhan Borang 16D pencagar'), menyebabkan plaintif memfailkan saman pemula di Mahkamah Tinggi untuk mendapatkan perintah penjualan 17 lot ('tindakan cagaran'). Salah seorang daripada lima plaintif dalam Saman No 43 telah meninggal dunia; empat yang tinggal berjaya campur tangan dalam tindakan cagaran ('pencelah'). Hakim Mahkamah Tinggi yang bijaksana ('HMT') menolak tindakan cagaran plaintif dan oleh itu rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada pencelah dihalang daripada menentang tindakan cagaran berdasarkan ketidaksahan cagaran pihak ketiga; (b) sama ada plaintif perlu mendapatkan persetujuan bertulis PN di bawah s 9(1) dan (2) GPA sebelum pelaksanaan dan pendaftaran cagaran pihak ketiga; (c) sama ada pencagar mempunyai kuasa dan kapasiti untuk mengenakan cagaran ke atas dua lot perkuburan; (d) sama ada plaintif adalah 'pihak atau mengetahui' dalam penipuan pencagar dan pemaju; dan (e) sama ada pencelah telah membuktikan 'sebab bertentangan' dalam s 256(3) Kanun Tanah Negara ('KTN').

Diputuskan, membenarkan rayuan:

(1) Pencelah kini dihalang daripada menentang tindakan cagaran atas alasan bahawa cagaran pihak ketiga adalah terbatal kerana plaintif dalam Saman No 43 telah memilih untuk menuntut hanya daripada pencagar dan pemaju dalam Saman No 43 berkaitan cagaran pihak ketiga dan tidak menuntut bahawa cagaran pihak ketiga adalah tidak sah. 'Estopel oleh tingkah laku dan pilihan' telah dibangkitkan di pihak pencelah. Kegagalan HMT untuk mempertimbangkan pemakaian estopel membentuk satu kesilapan undang-undang di mana campur tangan rayuan adalah wajar (lihat perenggan 38 & 40).

(2) Tafsiran s 9(1) dan (2) GPA adalah satu persoalan undang-undang. Plaintif tidak dikehendaki oleh s 9(1) dan (2) APK untuk mendapatkan kebenaran bertulis PN sebelum pelaksanaan dan pendaftaran cagaran pihak ketiga kerana pelaksanaan dan pendaftaran cagaran pihak ketiga tidak berkaitan dengan dua hak dalam s 9(1) APK, iaitu: (a) plaintif tidak memfailkan saman berkaitan pelanggaran amanah dalam kes ini; (b) plaintif tidak memulakan saman untuk mendapatkan arahan mahkamah yang dianggap perlu untuk amanah; dan (c) plaintif tidak memohon ke mahkamah untuk menyertai sebagai pihak dalam mana-mana saman sedia ada bagi pihak Kerajaan atau awam berkaitan amanah. Tambahan

pula, pelaksanaan dan pendaftaran cagaran pihak ketiga tidak berdasarkan mana-mana tujuan yang ditetapkan dalam s 9(1)(a) hingga (i) APK. HMT telah melakukan kesilapan undang-undang dengan memerlukan plaintif untuk mendapatkan persetujuan bertulis PN di bawah s 9(1) APK sebelum tindakan cagaran dimulakan (lihat perenggan 44–46).

(3) Pencagar mempunyai kuasa dan kapasiti untuk mengenakan cagaran ke atas dua lot perkuburan di bawah s 92(2)(c) dibaca bersama s 241(1) KTN. Seksyen 21(1) Akta Pemegang Amanah 1949 ('TA') tidak terpakai kerana pencagar, sebagai pemegang amanah bersama amanah, tidak diberi kuasa oleh perjanjian atau undang-undang untuk 'membayar atau menggunakan wang modal tertakluk kepada amanah untuk apa-apa tujuan atau dalam apa jua cara'. Oleh itu, tidak ada ruang untuk pencelah bergantung kepada s 21(2) TA untuk menentang rayuan. Seksyen 22 TA adalah suatu peruntukan yang bebas daripada s 21(2) TA dan oleh itu s 21(2) TA tidak boleh membentuk 'larangan atau had' terhadap kuasa pencagar untuk mengenakan cagaran tanah dalam erti s 241(3)(a) KTN. Dengan itu, cagaran pihak ketiga yang didaftarkan adalah tidak boleh disangkal menurut s 340(1) KTN kerana pendaftaran cagaran pihak ketiga tidak diperoleh 'melalui instrumen yang tidak mencukupi atau tidak sah' seperti yang difahami dalam s 340(2)(b) KTN. Satu kesilapan undang-undang telah dilakukan oleh HMT ketika diputuskan bahawa pencagar tidak mempunyai kapasiti untuk melaksanakan dan mendaftarkan cagaran pihak ketiga bagi pihak plaintif (lihat perenggan 48 & 50–51).

(4) Notis atau pengetahuan sebenar plaintif tentang kewujudan amanah; tentang fakta bahawa dua lot perkuburan adalah sebahagian daripada perkara amanah; dan bahawa pencagar adalah pemegang amanah bersama amanah, tidak boleh dianggap sebagai notis atau pengetahuan sebenar plaintif mengenai penipuan pencagar dan pemaju sebelum pelaksanaan dan pendaftaran cagaran pihak ketiga. Frasa 'pihak atau mengetahui' dalam s 340(2)(a) KTN tidak boleh termasuk notis atau pengetahuan konstruktif mengenai penipuan tersebut dan oleh itu pencelah tidak boleh bergantung kepada notis atau pengetahuan konstruktif untuk menentang rayuan. Dengan itu, HMT telah melakukan kesilapan undang-undang dengan memutuskan bahawa plaintif tidak melaksanakan usaha wajar untuk memastikan status perkara cagaran pihak ketiga sebelum pendaftaran cagaran pihak ketiga. Kecuaian plaintif, jika ada, tidak boleh sama dengan hakikat bahawa plaintif adalah 'pihak atau mengetahui' dalam penipuan. Plaintif juga telah bergantung kepada perkhidmatan dan nasihat profesional peguam plaintif dan oleh itu plaintif tidak bersikap cuai (lihat perenggan 55–57 & 59–60).

(5) Oleh kerana: (a) cagaran pihak ketiga adalah sah dan tidak boleh dipertikaikan di bawah s 340(1) KTN; (b) pelanggaran cagaran pihak ketiga telah berlaku; (c) plaintif telah menyampaikan Borang 16D kepada pencagar dan tidak ada pertikaian mengenai ketidakpatuhan pencagar terhadap Borang 16D; dan (d) tindakan cagaran mematuhi A 83 Kaedah-Kaedah Mahkamah 2012, pencagar dan pencelah mempunyai beban undang-undang dan keterangan untuk membuktikan kepada mahkamah tentang kewujudan 'sebab bertentangan' dalam s 256(3) KTN. Mahkamah tidak boleh menolak tindakan cagaran di bawah s 256(3) KTN atas alasan dasar awam dan/atau pengayaan tidak adil. HMT telah melakukan kesilapan dalam memutuskan bahawa cagaran pihak ketiga bertentangan dengan dasar awam. Perintah untuk menjual 17 lot tidak bertentangan dengan mana-mana prinsip undang-undang dan/atau ekuiti (lihat perenggan 63 & 65–67).]

Cases referred to

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85, FC (refd)

Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahaya bin Ibrahim) & Anor and another appeal [2004] 1 MLJ 525; [2004] 1 CLJ 797, CA (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners) [1996] 2 MLJ 431, HC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, FC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Malaysian Trustees Bhd v Pilecon Engineering Bhd [2019] 11 MLJ 537, HC (refd)

Maysie Long & Anor v Rahimah bt Mohd Noor & Ors [2023] 6 MLJ 723, CA (refd)

Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan [2020] 12 MLJ 54, FC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)

T Sivam Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy) v Public Bank Bhd [2018] 5 MLJ 711, FC (refd)

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 70

Government Proceedings Act 1956 ss 2(2), 9, 9(1), 9(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (1)(i), (2)

Interpretation Acts 1948 and 1967 ss 2(1)(b), 14, Part I

National Land Code ss 92(1), (2)(c), 241(1), (3), (3)(a), 242(1), 254(3)(a), (3)(b), 255(1), 256(2), (3), 319(1)(a), (1)(b)(i), (2), 320(1)(a), 340(1), (2)(a), (2)(b), (2)(c), (4)(b), Forms 16A, 16D, 19B
Revision of Laws Act 1968
Rules of Court 2012 O 83
Rules of the Court of Appeal 1994 rr 54, 96
Trustee Act 1949 ss 3(1), 21(1), (2), 22

Appeal from: Originating Summons No PA-24FC-335–06 of 2018 (High Court, Penang)

Jeyasingam Balasingam (with Kartikumar a/l Seamreasan) (Ghazi & Lim) for the appellant.
GK Ganesan Kasinathan (with Saravanesh a/l Supramaniam, Geetha Kesavan Nair, TP Vaani, JN Lheela and Siti Norain bt Mohammed) (Allen Chee Ram) for the first, second, third and fourth respondents.

Wong Kian Kheong JCA (delivering judgment of the court):

A. INTRODUCTION

[1] This appeal concerns, among others, a novel question of whether a chargee of land under the National Land Code ('the NLC') is required by s 9(1) of the Government Proceedings Act 1956 ('the GPA') to obtain the Attorney General's ('AG') written consent before executing and registering the charge over the land which is:

(1) the subject matter of public, religious and charitable trust; and

(2) used as a Hindu burial ground.

B. BACKGROUND

[2] We shall refer to the parties as they were before the High Court.

[3] By an indenture dated 12 March 1896 ('indenture'), a public, religious and charitable trust ('trust') over three lots of land in Jelutong, Penang ('three lots') was created for the benefit of the 'Hindu Community of Jelutong'. The three lots are Lot Nos 64, 83 and 84.

[4] The three lots are managed by a Hindu 'Temple Committee' ('committee').

[5] A Hindu temple was built on Lot No 64 while Lots No 83 and 84 were used as a Hindu burial ground ('two burial lots').

[6] Mr S Muthiah a/l Vellasamy ('Muthiah') was the sole surviving trustee of the trust. Muthiah refused to cooperate with the committee and secretly (without the committee's knowledge) obtained a High Court order on 10 February 1993 to appoint Mr Subramaniam a/l Muthusamy ('Subramaniam') as a co-trustee of the trust.

[7] Muthiah passed on and without the committee's knowledge, on 1 November 1995, Subramaniam applied to the High Court for an order to appoint Subramaniam's wife, Madam Lalidah a/p Sinnasamy ('second defendant'), as a co-trustee of the trust.

[8] This judgment shall refer to Subramaniam and the second defendant collectively as the 'chargors'.

[9] On 6 September 1999, the AG gave a written consent pursuant to s 9(1) of the GPA for the chargors to file an application to the High Court for leave to develop the three lots ('AG's written consent (6 September 1999)').

[10] Following the AG's written consent (6 September 1999), the chargors filed an originating summons ('OS') in the High Court on 2 November 1999 for leave to develop the three lots ('chargors' OS (leave to develop three lots)').

[11] On 8 December 1999, the High Court allowed the chargors' OS (leave to develop three lots) ('High Court's leave (8 December 1999)').

[12] The chargors entered into a joint venture agreement dated 1 January 2005 ('JV agreement') with Sumita Development Sdn Bhd ('developer'). With regard to the developer:

(1) the chargors owned 60% of the shares in the developer and were its directors; and

(2) two children of the chargors were directors of the developer and held 40% of its shares.

[13] On 9 March 2005, the chargors rejected the committee's nomination for three additional co-trustees of the trust.

[14] The developer applied for the following banking facilities from the plaintiff bank ('plaintiff'):

(1) an overdraft facility in a sum of RM800,000 ('OD facility'); and

(2) a bridging loan of an amount of RM2.4m ('banking facilities').

[15] The developer's repayment of the banking facilities to the plaintiff was secured by the chargors' execution of a third party charge over the two burial lots in favour of the plaintiff ('third party charge'). The third party charge was registered under the NLC on 29 December 2010.

[16] On 3 June 2011, at the request of the plaintiff, the chargors and developer jointly filed an OS in the High Court ('OS (chargors-developer)'). The OS (chargors-developer) prayed for leave of the High Court for the following matters:

(1) leave for the chargors and developer to transact any dealing under the NLC with regard to the two burial lots;

(2) leave of the High Court for the registration of the third party charge;

(3) leave for the JV agreement; and

(4) the Registrar of Titles of Penang ('RT') and all relevant authorities shall give effect to the order of the High Court granted in the OS (chargors-developer).

[17] On 6 July 2011, the High Court granted an order in the terms of the OS (chargors-developer) ('High Court's leave (6 July 2011)').

[18] The plaintiff only allowed the developer to utilise the banking facilities after the granting of the High Court's leave (6 July 2011).

[19] On 26 June 2012, the chargors had successfully applied to the RT to sub-divide the two burial lots into 17 lots of land ('17 lots').

[20] The developer had utilised the OD facility in full.

[21] On 12 April 2014, the secretary of the committee, Mr Kalidass a/l Anumanthan, lodged a police report regarding the breach of trust by the chargors.

C. SUIT AGAINST THE CHARGORS

[22] Civil Suit No 22NCVC-43–03 of 2014 was filed in the High Court on 28 March 2014 ('Suit No 43') by five beneficiaries of the 'Hindu Community of Jelutong' ('five plaintiffs (Suit No 43)') against the chargors and developer. According to the statement of claim in Suit No 43 ('SOC'), among others:

(1) sub-para 35(L) pleaded that the third party charge had been registered in favour of the plaintiff as security for the banking facilities to the developer; and

(2) in sub-para 67(6.2), the five plaintiffs (Suit No 43) prayed for a consequential order (*perintah lanjutan*) for the chargors to take all necessary steps to discharge the third party charge from the plaintiff and to transfer the three lots (before the sub-division of the two burial lots into 17 lots) to the five plaintiffs (Suit No 43) as co-trustees of the trust, free from any encumbrance ('prayer 67(6.2) (SOC)').

[23] On 17 October 2016, after a trial, the High Court allowed Suit No 43 and adjudged as follows, among others ('High Court's judgment (Suit No 43)'):

(1) the chargors had breached the trust ('chargors' breach of trust');

(2) the AG's written consent (6 September 1999) had been obtained by way of a concealment of material facts by the chargors;

(3) the High Court's leave (8 December 1999) and High Court's leave (6 July 2011) were set aside;

(4) the chargors were removed as co-trustees of the trust;

(5) the five plaintiffs (Suit No 43) were appointed as co-trustees of the trust; and

(6) prayer 67(6.2) (SOC) was allowed wherein the chargors were ordered to take all necessary steps to discharge the third party charge from the plaintiff and to transfer the three lots (before the sub-division of the two burial lots into 17 lots) to the five plaintiffs (Suit No 43) as co-trustees of the trust, free from any encumbrance and within 90 days from the date of the court's order ('High Court's judgment (sub-para 6.2)').

[24] Subramaniam died on 17 April 2017. On 4 September 2018, the plaintiff obtained an order of the High Court to appoint the first defendant ('first defendant') as the administrator of the estate of Subramaniam.

[25] With regard to the High Court's judgment (Suit No 43):

(1) the chargors and developer appealed to the Court of Appeal against the High Court's judgment (Suit No 43) but this appeal was dismissed on 19 September 2018 ('Court of Appeal's decision (Suit No 43)'); and

(2) the chargors and developer initially applied for leave of the Federal Court to appeal against the Court of Appeal's decision (Suit No 43) but this application was subsequently withdrawn.

D. APPLICATION BY THE PLAINTIFF FOR ORDER OF SALE OF 17 LOTS

[26] Since 15 December 2014, the developer defaulted in the repayment of the OD facility ('developer's default (OD facility)'). The plaintiff sent three notices dated 17 December 2014, 13 February 2015 and 2 June 2015 for the developer's default (OD facility) to be remedied but to no avail.

[27] On 24 November 2015, the plaintiff terminated the banking facilities and demanded the developer to pay the then outstanding sum due and owing by the developer to the plaintiff. The developer did not however pay the amount demanded by the plaintiff.

[28] The plaintiff's solicitors sent a demand dated 7 October 2016 for the chargors to pay a sum of RM817,705.45 which was due and owing by the developer to the plaintiff as at 31 August 2016. The chargors did not accede to this demand ('breach (third party charge)').

[29] As a result of the breach (third party charge), on 27 January 2017, Form 16D (under the NLC) was sent by the plaintiff for the breach (third party charge) to be remedied by the chargors within one month from the date of service of the Form 16D. The chargors however failed to remedy the breach (third party charge) within the stipulated one-month period ('chargors' non-compliance (Form 16D)').

[30] As a result of the chargors' non-compliance (Form 16D), on 29 June 2018, the plaintiff filed an OS in the High Court for an order of sale of the 17 lots under s 256(2) of the NLC ('charge action').

[31] One of the five plaintiffs (Suit No 43) had passed on. The remaining four of the five plaintiffs (Suit No 43) applied successfully in the High Court to intervene in the charge action ('four interveners').

[32] The learned High Court judge dismissed the charge action with costs of RM5,000 to be paid by the plaintiff to the four interveners ('High Court's decision'). Hence, this appeal by the plaintiff to the Court of Appeal against the High Court's decision ('this appeal').

[33] In this appeal, the chargors were not represented by learned counsel.

E. GROUNDS FOR HIGH COURT'S DECISION

[34] The learned judge gave the following grounds for the High Court's decision in her written judgment (High Court's judgment):

(1) when the chargors registered the third party charge under the NLC in favour of the plaintiff, this constituted a cause in law and in equity for the High Court to refuse an order for sale of the 17 lots under s 256(3) of the NLC — paras 34 to 36 High Court's judgment;

(2) in para 36 High Court's judgment, the learned judge held that the registration of the third party charge was contrary to public policy;

(3) the learned judge relied on the High Court's judgment (Suit No 43) which decided that the chargors had breached the trust in this case — para 37 High Court's judgment;

(4) the plaintiff had not exercised due diligence to ascertain the status of the subject matter of the third party charge before the registration of the third party charge — paras 38 to 41 High Court's judgment;

(5) according to the learned judge in paras 42 and 44 High Court's judgment:

(a) the registration of the third party charge was void ab initio because the AG did not consent to the third party charge under s 9 of the GPA; and

(b) the third party charge was invalid notwithstanding the fact that the plaintiff was not a party in Suit No 43.

(6) the third party charge was void because the chargors had no capacity to charge the two burial lots to the plaintiff — paras 43 and 45 High Court's judgment; and

(7) in paras 45 and 46 High Court's judgment, the learned judge decided that the registered third party charge was defeasible on the following grounds:

(a) fraud by the chargors; and

(b) the chargors had no capacity to charge the two burial lots to the plaintiff.

F. CONTENTIONS OF THE PLAINTIFF AND FOUR INTERVENERS

[35] In support of this appeal, the plaintiff's learned counsel has submitted as follows, among others:

(1) the third party charge was not defeasible under s 340(2)(a) of the NLC because the plaintiff was neither party nor privy to any fraud committed

by the chargors with regard to the two burial lots;

(2) the third party charge was not void on the ground that the chargors had no capacity to create and register the third party charge in favour of the plaintiff;

(3) s 9(1) of the GPA did not require the AG's written consent before the execution and registration of the third party charge ('execution/registration (third party charge)'); and

(4) the four interveners had admitted that the third party charge was valid in Suit No 43. Consequently, the four interveners are now estopped from disputing the validity of the third party charge in the charge action.

[36] This appeal was vigorously resisted by the four interveners on the following grounds, among others:

(1) before the plaintiff agreed to:

(a) grant the banking facilities to the developer; and

(b) accept the two burial lots as security for the developer's repayment of the banking facilities,
– the plaintiff, as a large and established commercial bank, had a duty to do due diligence to ensure that:

(i) the chargors had the capacity to execute the third party charge; and

(ii) the third party charge was valid.

(2) the following documents showed that the plaintiff had actual or constructive knowledge that the chargors held the two burial lots as co-trustees for the trust:

(a) the register document of title ('RDT') showed the chargors as co-trustees for the trust;

(b) on 14 December 2010, the chargors had executed Form 16A (the instrument required by s 242(1) of the NLC to register the third party charge) which stated that the chargors were the co-trustees for the trust;

(c) according to the JV agreement, the chargors were co-proprietors of the two burial lots as the co-trustees for the trust; and

(d) a letter dated 3 January 2011 from the plaintiff's solicitors for the banking facilities and third party charge, Messrs 'VM Mohan, Fareed & Co' ('plaintiff's charge documentation solicitors'), to the plaintiff stated that, among others, the chargors were the co-trustees for the trust ('letter dated 3 January 2011 (plaintiff's charge documentation solicitors)').

The plaintiff's charge documentation solicitors were the plaintiff's agents in this case. In accordance with the Federal Court case of *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711, the actual knowledge of the existence of the trust by the plaintiff's charge documentation solicitors could be imputed to the plaintiff.

(3) the plaintiff should have asked for a copy of the indenture from the chargors. Consequently:

(a) the plaintiff was negligent in not requesting for a copy of the indenture from the chargors; and/or

(b) the plaintiff had wilfully turned a blind eye to the existence of the trust.

(4) the plaintiff had actual knowledge of the chargors' breach of trust because:

(a) on 13 November 2009, the second of the four interveners (Mr Supramaniam a/l Marimuthu ('second intervener')), entered a private caveat over the two burial lots ('second intervener's private caveat'); and

(b) the second intervener's statutory declaration in Form 19B (in support of the entry of the second intervener's private caveat) had made allegations regarding the chargors' breach of trust.

(5) the plaintiff had knowingly assisted in:

(a) the chargors' breach of trust; and

(b) the fraud committed by the chargors in this case ('chargors' fraud').

(6) the third party charge was void because:

(a) the third party charge was registered as a result of the chargors' breach of trust and chargors' fraud. Hence, the third party charge was defeasible according to s 340(2)(a) of the NLC;

(b) the chargors had no capacity, power, permission or authority to create and register the third party charge. Consequently, by virtue of s 340(2)(b) of the NLC, the third party charge was not indefeasible;

(c) there was no written consent by the AG for the execution/registration (third party charge) pursuant to s 9(1) of the GPA. At the trial in Suit No 43, the learned senior federal counsel, Encik Rosli bin Ahmad ('SFC'), represented the AG. The learned SFC testified that, among others, the execution/registration (third party charge) required the AG's written consent under s 9 of the GPA ('SFC's opinion (s 9 of the GPA)'); and

(d) the third party charge was contrary to public policy. Reliance was placed on the High Court's judgment in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)*

[1996] 2 MLJ 431, at p 435.

G. ISSUES

[37] The following questions shall be determined in this appeal:

(1) in view of prayer 67(6.2) (SOC) and the High Court's judgment (sub-para 6.2) wherein the four interveners had admitted that the third party charge was valid, whether the four interveners are estopped from resisting the charge action based on the invalidity of the third party charge;

(2) with regard to the novel issue stated in the above para 1:

(a) whether the SFC's opinion (s 9 of the GPA) is relevant in the interpretation of s 9(1) of the GPA; and

(b) did the chargors have the power or capacity to execute and register the third party charge in favour of the plaintiff? This question also discusses the effect of:

(i) ss 92(2)(c), 241(1), (3)(a) and 340(2)(b) of the NLC; and

(ii) ss 21(1), (2) and 22 of the Trustee Act 1949 ('the TA').

(3) was the plaintiff 'party or privy' to the fraud of the chargors and developer ('fraud (chargors/developer)') within the meaning of s 340(2)(a) of the NLC? In this regard:

(a) did the plaintiff have actual notice or knowledge ('actual notice/knowledge') of the fraud (chargors/developer) before the execution/registration (third party charge)?

(b) whether the plaintiff's actual notice/knowledge:

(i) of the existence of the trust;

(ii) of the fact that the two burial lots are part of the subject matter of the trust; and

(iii) that the chargors were co-trustees of the trust,
– amounted to actual notice/knowledge of the fraud (chargors/developer) on the part of the plaintiff before the execution/registration (third party charge); and

(c) if the plaintiff had no actual notice/knowledge of the fraud (chargors/developer) before the execution/registration (third party charge), can the phrase 'party or privy' in s 340(2)(a) of the NLC include:

A (i) constructive or equitable notice or knowledge ('constructive notice/knowledge'); and/or

(ii) negligence on the part of the plaintiff in not ascertaining that no fraud (chargors/developer) had occurred before the execution/registration (third party charge)?

B

(4) had the four interveners proven 'cause to the contrary' in s 256(3) of the NLC in this case so as to defeat the charge action? This question concerns the following matters:

C (a) does the phrase 'cause to the contrary' in s 256(3) of the NLC include:

(i) public policy; and/or

(ii) unjust enrichment?

D (b) whether the four interveners had proven on a balance of probabilities the following 'cause to the contrary' in s 256(3) of the NLC:

(i) the third party charge is defeasible pursuant to s 340(2)(a) and/or (b) of the NLC;

E (ii) the plaintiff had failed to comply with the conditions precedent for the filing of the charge action in this case; and/or

(iii) an order for sale of the 17 lots will be contrary to the rule of law and/or equity.

F H. WHETHER FOUR INTERVENERS ARE ESTOPPED FROM RESISTING CHARGE ACTION

[38] We accept the submission by the plaintiff's learned counsel that the four interveners are now estopped from opposing the charge action on the G ground that the third party charge is void. This decision is premised on the following evidence and reasons:

(1) in Suit No 43:

H (a) the five plaintiffs (Suit No 43) were legally represented at all material times;

(b) the five plaintiffs (Suit No 43):

(i) only claimed from the chargors and developer;

I (ii) did not include the plaintiff as one of the co-defendants in Suit No 43; and

(iii) did not claim that the third party charge was invalid (as the four interveners had alleged in the charge action);

(c) prayer 67(6.2) (SOC) was made;

(d) after a trial, the five plaintiffs (Suit No 43) obtained, among others, the High Court's judgment (sub-para 6.2); and

(e) the High Court's judgment (sub-para 6.2) had been affirmed on appeal to the Court of Appeal,
('conduct (five plaintiffs (Suit No 43)').

(2) the conduct (five plaintiffs (Suit No 43) had unequivocally shown that the five plaintiffs (Suit No 43) had elected:

(a) to claim only from the chargors and developer in Suit No 43 in respect of the third party charge; and

(b) not to claim that the third party charge was invalid.

The following judgment of the Federal Court delivered by Rhodzariah Bujang FCJ in *Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan* [2020] 12 MLJ 54, at [16], is pertinent:

> [16] ... *Equally important to consider is its other conduct in accepting the non-retrospective approval for the transaction by effecting the payment as stipulated in the respondent's dated 9 April 2015 which we had mentioned earlier. Such conscious conduct on the part of the appellant, viewed cumulatively must surely be held against it for it raises the application of the principle of law, in the words of Sir Nicholas Broune-Wilkinson VC in Express Newspaper plc v News (UK) Ltd and others* [1990] 3 All ER 376 '... *that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance*'. (Emphasis added.)

In this case, the conduct (five plaintiffs (Suit No 43)) had raised an 'estoppel by conduct and election' on the part of the four interveners ('estoppel by conduct and election'); and

(3) in this case, it is not inequitable for the plaintiff to rely on the estoppel by conduct and election because:

(a) the plaintiff had disbursed the entire OD facility of RM800,000 to the developer;

(b) as explained in para 55 below, the plaintiff had no actual notice/knowledge of the fraud (chargors/developer) before the execution/registration (third party charge);

(c) the plaintiff had relied on the following documents before the disbursement of the OD facility to the developer:

(i) the AG's written consent (6 September 1999);

(ii) the High Court's leave (8 December 1999); and

(iii) the High Court's leave (6 July 2011).

The High Court's judgment (Suit No 43) had nullified the effect of the AG's written consent (6 September 1999), High Court's leave (8 December 1999) and High Court's leave (6 July 2011) with effect from 17 October 2016 (date of High Court's judgment (Suit No 43). As against the plaintiff, the High Court's judgment (Suit No 43) cannot have retrospective effect. Consequently, the plaintiff could rely on the AG's written consent (6 September 1999), High Court's leave (8 December 1999) and High Court's leave (6 July 2011) to show that the plaintiff did not act inequitably and/or negligently in disbursing the OD facility to the developer; and

(d) before the disbursement of the OD facility to the developer, the plaintiff's charge documentation solicitors had been appointed for a professional fee to advise and to do due diligence for the plaintiff. The plaintiff's charge documentation solicitors had done due diligence in respect of the third party charge. In fact, the letter dated 3 January 2011 (plaintiff's charge documentation solicitors) had advised the plaintiff that, among others:

(i) the then Chairman of the committee entered a private caveat over the three lots ('committee's private caveat') but the committee's private caveat was removed by the High Court on 30 October 2009 (in para 8). There was no appeal to the Court of Appeal against the removal of the committee's private caveat; and

(ii) in paras 9 and 10, the plaintiff was advised by the plaintiff's charge documentation solicitors that three other private caveats over the three lots had been removed; and

(iii) 'the legal documentation is in order' (para 21).

[39] The conduct (five plaintiffs (Suit No 43)), in our view, distinguishes this case from the host of cases cited by the four interveners learned counsel.

[40] The failure of the learned High Court judge to consider the conduct (five plaintiffs (Suit No 43)) in this case which attracted the application of estoppel by conduct and election, in our view, constituted an error of law wherein appellate intervention is warranted ('High Court's first legal error').

[41] It is to be noted that when the committee's private caveat and the second intervener's private caveat were removed:

(1) steps could and should have been taken by the committee and/or second intervener to appeal for a reinstatement of those private caveats;

(2) any member of the Hindu Community of Jelutong (other than the Chairman of the committee (who entered the committee's private caveat) and the second intervener) may enter a fresh private caveat over the two burial lots; and/or

(3) the committee, five plaintiffs (Suit No 43) and/or any member of the Hindu Community of Jelutong may apply for the entry of a Registrar's caveat under s 320(1)(a) of the NLC (to prevent the fraud (chargors/developer)). Unlike a private caveat, by virtue of s 319(2) of the NLC, a Registrar's caveat shall prohibit the registration of the third party charge even though the third party charge had been presented for registration before the entry of the Registrar's caveat.

We reproduce below ss 319(1)(a), (b)(i), (2), 320(1)(a), 322(1)(b) and (2)(a) of the NLC:

s 319 *Nature and effect of Registrar's caveats*

(1) *A caveat under this section shall be known as a 'Registrar's caveat', and —*

(a) *may be entered by the Registrar on the register document of title to any land in any of the circumstances specified in section 320;*

(b) *subject to subsection (3), shall, so long as it continues in force, have the effect of prohibiting the registration, endorsement or entry on that document of —*

(i) *any instrument of dealing*;

...

(2) *The prohibition imposed by a Registrar's caveat shall apply to any such instrument notwithstanding that it was presented for registration before the caveat was entered*, and to any such claim or lienholder's caveat *notwithstanding that the application for its endorsement or entry was received before that time*.

...

s 320 *Circumstances in which Registrar's caveats may be entered*

(1) *Subject to subsection (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable —*

(a) *for the prevention of fraud* or improper dealing; or

...

s 322 *Nature and effect of private caveats*

(1) *A caveat under this section shall be known as a 'private caveat', and —*

...

(b) *shall have the effect specified in subsection (2) or (3), according as it is expressed to bind the land itself* or an undivided share in the land or merely a particular interest therein.

(2) *The effect of any private caveat expressed to bind the land itself* or an undivided

share in the land shall, subject to subsections (4) and (5), *be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of —*

(a) *any instrument of dealing executed by or on behalf of the proprietor thereof*, and any certificate of sale relating thereto;

... (Emphasis added.)

Needless to say, if the steps explained in the above sub-paras (1) to (3) are taken, the registration of the third party charge would not have been effected.

I. WAS THE PLAINTIFF REQUIRED TO OBTAIN AG'S WRITTEN CONSENT UNDER S 9(1) AND (2) OF THE GPA BEFORE EXECUTION/REGISTRATION (THIRD PARTY CHARGE)?

[42] According to s 9(1) and (2) of the GPA:

GPA

s 9 *Public, religious*, social or *charitable trusts*

(1) *In the case of any alleged breach of any express* or constructive *trust for public, religious*, social or *charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of*:

(a) *asserting any interest or right in the trust property;*

(b) *removing any trustee;*

(c) *appointing a new trustee;*

(d) *vesting any property in a trustee;*

(e) *directing accounts and inquiries;*

(f) *declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;*

(g) *authorizing the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged;*

(h) *settling a scheme; and*

(i) *obtaining such further or other relief as the nature of the case may require.*

(2) *No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.* (Emphasis added.)

[43] We are of the following view regarding s 9(1) and (2) of the GPA:

(1) s 9(1) of the GPA in an enabling statutory provision ('enabling provision') wherein Parliament confers two rights ('two rights (s 9(1) of the GPA)') on two categories of persons ('two categories (s 9(1) of the GPA)');

(2) the two rights (s 9(1) of the GPA) are:

(a) the right to file the following two suits ('two suits (s 9(1) of the GPA)'):

(i) a suit regarding any alleged breach ('suit (breach of public/religious/social/charitable trust)') of an express or constructive trust for public, religious, social or charitable purposes ('public/religious/social/charitable trust') and the suit (breach of public/religious/social/charitable trust) is filed based on any one of the purposes stipulated in s 9(1)(a) to (i) of the GPA ('purposes (s 9(1)(a) to (i) of the GPA)'); and

(ii) a suit 'where the direction of the court is deemed necessary for the administration' of the public/religious/social/charitable trust ('suit for directions (public/religious/social/charitable trust)') and the suit for directions (public/religious/social/charitable trust) is filed premised on any one of the purposes (s 9(1)(a) to (i) of the GPA).

(b) the right to be joined as a party ('joinder right') in any existing suit on behalf of:

(i) the 'Government' (defined in s 2(2) of the GPA to include both the Federal and State Governments); or

(ii) the public,
– and the joinder right is based on any one of the purposes (s 9(1)(a) to (i) of the GPA).

(3) the two categories (s 9(1) of the GPA) are:

(a) the AG; and

(b) 'two or more persons having an interest' in a public/religious/social/charitable trust ('interested persons (public/religious/social/charitable trust)') and the interested persons (public/religious/social/charitable trust) have obtained the AG's written consent for the exercise of the two rights (s 9(1) of the GPA).
The requirement of the AG's written consent in s 9(1) of the GPA before the interested persons (public/religious/social/charitable trust) can exercise the two rights (s 9(1) of the GPA), is to ensure that strangers to the public/religious/social/charitable trust or mere busybodies cannot simply exercise the two rights (s 9(1) of the GPA).

(4) s 9(2) of the GPA reiterates that the two suits (s 9(1) of the GPA) cannot be instituted unless there is compliance with the conditions stipulated in s 9(1) of the GPA, namely:

(a) the suit (breach of public/religious/social/charitable trust) can only be filed if there is an alleged breach of a public/religious/social/charitable trust;

(b) the suit for directions (public/religious/social/charitable trust) can only be commenced where the direction of the court is deemed necessary for the administration of the public/religious/social/charitable trust;

(c) the two suits (s 9(1) of the GPA) must be premised on any one of the purposes (s 9(1)(a) to (i) of the GPA); and

(d) the interested persons (public/religious/social/charitable trust) must have obtained the AG's written consent before the institution of the two suits (s 9(1) of the GPA).

[44] Firstly, the construction of s 9(1) and (2) of the GPA is a question of law. Hence, contrary to the submission of the learned counsel for the four interveners, the SFC's opinion (s 9 of the GPA) is irrelevant in the interpretation of s 9(1) and (2) of the GPA.

[45] Secondly, we have no hesitation to decide that the plaintiff was not required by s 9(1) and (2) of the GPA to obtain the AG's written permission before the execution/registration (third party charge). Our reasons are as follows:

(1) the execution/registration (third party charge) does not concern the two rights (s 9(1) of the GPA), namely:

   (a) the plaintiff did not file a suit regarding the breach of the trust in this case;

   (b) the plaintiff did not institute a suit to seek for directions of the court which are deemed necessary for the trust; and

   (c) the plaintiff did not apply to court to join as a party in any existing suit on behalf of the Government or public with regard to the trust; and

(2) the execution/registration (third party charge) was not based on any one of the purposes (s 9(1)(a) to (i) of the GPA).

[46] Premised on the reasons explained in the above paras 43 and 45, the learned High Court judge had erred in law in requiring the plaintiff to obtain the AG's written consent under s 9(1) of the GPA before the charge action was instituted ('High Court's second legal error').

J. DID CHARGORS HAVE POWER AND CAPACITY TO CHARGE TWO BURIAL LOTS?

[47] We reproduce below ss 92(2)(c), 241(1), (3)(a), 340(1), (2)(a), (b) of the NLC, s 21(1), (2) and 22 of the TA:

NLC

s 92(2) *The rights exercisable by any person or body to whom State land has been alienated under final title shall include the following:*

...

(c) *the right (subject as aforesaid) to effect* transfers, leases, *charges*, surrenders, and any other dealings *permitted under Division IV*; ...

s 241 *Powers of charging*

(1) *Subject to sub-section (3) —*

(a) *the whole, but not a part only, of any alienated land;*

(b) the whole, but not a part only, of any undivided share in alienated land; and

(c) any lease of alienated land,

may be charged under [NLC] with —

(aa) *the repayment of any debt*, or the payment of any sum other than a debt; or

(bb) the payment of any annuity or other periodic sum.

...

(3) *The said powers shall be exercisable in any particular case subject to —*

(a) *any prohibition or limitation imposed by (NLC) or any other written law for the time being in force;*

...

s 340(1) *The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.*

(2) *The title or interest of any such person or body shall not be indefeasible:*

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) *where registration was obtained by forgery, or by means of an insufficient or void instrument; or ...*

TA

s 21 *Power to raise money by* sale, *charge, etc*.

(1) *Where trustees are authorized by the instrument, if any, creating the trust or by*

law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or *charge of all or any part of the trust property for the time being in possession.*

(2) *This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes.*

s 22 *Protection to* purchasers and *chargees dealing with trustees.*

No purchaser or *chargee, paying or advancing money on a* sale or *charge purporting to be made under any trust or power vested in trustees, shall be concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.* (Emphasis added.)

[48] The chargors had the power and capacity to charge the two burial lots under s 92(2)(c) read with s 241(1) of the NLC ('chargors' power to charge land').

[49] For reasons explained in the above para 43, s 9(1) of the GPA is an enabling provision and not a 'prohibition or limitation' on the chargors' power to charge land within the meaning of s 241(3)(a) of the NLC.

[50] With regard to ss 21(1), (2) and 22 of the TA:

(1) s 21(1) of the TA only applies in the following circumstances:

(a) trustee(s) is/are authorised by the trust instrument or law to 'pay or apply capital money subject to the trust for any purpose or in any manner' ('condition (s 21(1) of the TA)'); and

(b) if the condition (s 21(1) of the TA) applies:

(i) trustee(s) 'shall have and shall be deemed always to have had power to raise the money required by ... charge of all or any part of the trust property for the time being in possession' ('trustee's power to charge trust property (s 21(1) of the TA)'); and

(ii) according to s 21(2) of the TA, a trustee of a charitable trust ('trustee (charitable trust)') has no power to charge the property of a charitable trust ('property (charitable trust)'), namely, there is no trustee's power to charge trust property (s 21(1) of the TA) with regard to charitable trusts.

(2) in this case, the condition (s 21(1) of the TA) does not apply. This is because the chargors, as co-trustees of the trust, were not authorised by the Indenture or law to 'pay or apply capital money subject to the trust for any purpose or in any

manner'. Consequently, if s 21(1) of the TA does not apply in this case, there cannot be any room for the four interveners to rely on s 21(2) of the TA to resist this appeal;

(3) when Parliament enacted the chargors' power to charge land in ss 92(2)(c) and 241(1) of the NLC (in 1965), Parliament is deemed to know existing law, namely, s 21(2) of the TA (enacted in 1949) — please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, at p 754. If Parliament had intended to subject the chargors' power to charge land in ss 92(2)(c) and 241(1) of the NLC to s 21(2) of the TA, Parliament would have expressly provided as such in s 241(3) of the NLC. However, Parliament deliberately chose not do so. Accordingly, the chargors' power to charge land in ss 92(2)(c) and 241(1) of the NLC (enacted in 1965 after s 21(2) of the TA (legislated in 1949)) should prevail over s 21(2) of the TA;

(4) as decided by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahaya bin Ibrahim) & Anor and another appeal* [2004] 1 MLJ 525; [2004] 1 CLJ 797, at pp 805 to 806, the NLC is a code of law which is comprehensive. If Parliament had intended to subject the chargors' power to charge land in ss 92(2)(c) and 241(1) of the NLC to s 21(2) of the TA, Parliament would have expressly stipulated as such in a comprehensive code of law in the NLC. This is however not the case;

(5) s 22 of the TA has expressly provided that a 'charge' (defined widely in s 3(1) of the TA to include an equitable charge) of the property of 'any trust' (which includes a public, religious or charitable trust) 'shall' not be 'concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof'. It is therefore clear that a chargee of property (charitable trust) can rely on s 22 of the TA to enforce the charge;

(6) TA had been revised under the Revision of Laws Act 1968. Hence, according to s 2(1)(b) of the Interpretation Acts 1948 and 1967 ('the IA'), Part I of the IA applies in the construction of TA. Section 14 of the IA (in Part I of the IA) states as follows:

> *s 14 Division into sections*
>
> *Every Act shall be divided into sections, each of which shall have effect as a substantive enactment without any introductory words.* (Emphasis added.)

By virtue of s 14 of the IA, s 22 of the TA is a provision which is independent of s 21(2) of the TA. Furthermore, if the legislature had intended for s 22 of

the TA to be subject to s 21(2) TA, the legislature would have expressly stated that s 22 of the TA shall be 'subject to' s 21(2) of the TA; and

(7) in view of the above effect of s 22 of the TA, s 21(2) of the TA cannot constitute a 'prohibition or limitation' on the chargors' power to charge land within the meaning of s 241(3)(a) of the NLC.

[51] As explained in the above paras 48 to 50, the chargors had the power and capacity to create and register the third party charge in this case. Consequently:

(1) the registered third party charge is indefeasible pursuant to s 340(1) of the NLC as the registration of the third party charge had not been obtained 'by means of an insufficient or void instrument' as understood in s 340(2)(b) of the NLC; and

(2) an error of law was committed by the learned High Court judge when she decided that the chargors had no capacity to execute and register the third party charge in favour of the plaintiff ('High Court's third legal error').

K. WAS THE PLAINTIFF 'OR PRIVY' TO FRAUD (CHARGORS/DEVELOPER)?

[52] In respect of the application of 'fraud' in s 340(2)(a) of the NLC, we refer to the following judgment of the Court of Appeal in *Maysie Long & Anor v Rahimah bt Mohd Noor & Ors* [2023] 6 MLJ 723, at [72]:

> [72] *We are of the following view regarding the application of 'fraud' in s 340(2)(a) of the NLC (fraud exception (s 340(2)(a) of the NLC)):*
>
> (1) *'fraud' in s 340(2)(a) of the NLC means 'actual fraud' and not 'equitable fraud' or 'constructive fraud' — please refer to the Federal Court's judgment delivered by Lee Hun Hoe CJ (Borneo) in Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196, at 200 to 201. Case law has not explained whether there is any relationship between actual fraud in s 340(2)(a) of the NLC and the definition of fraud in s 17(a) to (e) of the CA (1950);
>
> (2) *for the first person in whose favour title/interest is registered in the RDT (Y) to challenge successfully the indefeasibility of an immediate purchaser's registered title/interest (Z), there are two scenarios, namely:*
>
> *(a) Z caused the actual fraud or was involved in the actual fraud (Z's actual fraud) which led to the registration of z's title/interest (first scenario); and*
>
> *(b) the actual fraud was caused by a third party (third party's actual fraud) and this then led to the registration of z's title/interest (second scenario);*
>
> *(3) in the first scenario, if Y can prove Z's actual fraud on a balance of probabilities:*

(a) Z's registered title/interest is defeasible pursuant to s 340(2)(a) of the NLC; and

(b) Y can apply to court to:

(i) *set aside Z's registered title/interest; and*

(ii) *reinstate Y's title/interest in the RDT; and*

(4) for the second scenario:

(a) to set aside Z's registered title/interest, Y must prove the following two matters on a balance of probabilities:

(i) *third party's actual fraud; and*

(ii) *Z was 'party or privy' to third party's actual fraud;*

(b) there is no definition of the terms 'party' and 'privy' in NLC;

(c) Z would be a 'party' to third party's actual fraud if Z had taken part in any manner in the third party's actual fraud;

(d) the word 'privy' is defined in 'The Shorter Oxford English Dictionary', Vol 2, at p 1674, as follows, among others (ordinary meaning (privy)):

...

4. The fact of being privy to something; participation in the knowledge of something private or secret, usu. Implying concurrence or consent; private knowledge or cognizance.(Emphasis added.);

(e) premised on the ordinary meaning (privy):

(i) if Z had actual knowledge of third party's actual fraud prior to the registration of Z's title/interest, Z would be privy to the third party's actual fraud within the meaning of s 340(2)(a) of the NLC; and

(ii) constructive notice or knowledge of third party's actual fraud (constructive notice/knowledge) cannot be imputed to Z under s 340(2)(a) of the NLC;

(f) in the Federal Court case of Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85*, at 88, Gill CJ (Malaya) has rejected constructive notice/knowledge under our Torrens System as follows:*

It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the Nominee Company being void, he cannot be a bona fide purchaser. The authority relied on for this contention is the old case of *Le Neve v Le Neve* (1747) Amb 436; 26 ER 1172. But *the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration* (see 14 Halsbury, (3rd Ed) para 1023 at p 545). *Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine* (see 14 Halsbury, (3rd Ed) para 1022 at p 545). (Emphasis added.)

We have not overlooked the Federal Court's judgment delivered by Azahar Mohamed FCJ (as he then was) in T Sivam Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy) v Public Bank Bhd [2018] 5 MLJ 711. It is decided in Sivam Tharamalingam, at [25] and [92], as follows:

> *[25] This court had granted leave to the plaintiff to bring the present appeal on the following two questions of law:*
>
> *(q) question 1:*
>
> *Whether knowledge on part of solicitor of claims which amount to encumbrances over a piece of land is imputed back to his client for the purposes of s 340(3) of the NLC? and*
>
> *(b) question 2:*
>
> *Whether the principle in Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 that the doctrine of constructive notice does not apply to the Torrens system in that an agent (solicitor)'s knowledge of fraud cannot be imputed to his client, is correct in law.*
>
> *Whether the principle in Doshi is applicable only where there is fraud on the part of the agent in the matter or also in cases whether the said agent was not complicit in the fraud alleged himself.*
>
> *...*
>
> *[92] In consequence and in view of the above, our answers to the legal issues posed are as follows. In the context of the issues arising in the present appeal as well as the facts of the case, the answer to question 1 is in the affirmative.*
>
> *[93] Flowing from the above, our answer to question 2 is as follows. The general rule is that the knowledge of a solicitor is regarded by law as the knowledge of the client. An exception to the rule is only admitted where the solicitor is complicit in fraud. (Emphasis added.)*

The Federal Court in Sivam Tharamalingam has only overruled Doshi to the following extent:

(i) *knowledge of fraud by a party's solicitor (who is not complicit to the fraud) can be imputed to the party; and*

(ii) *knowledge of fraud by a party's solicitor (who is complicit to the fraud) cannot be imputed to the party*

Save for the above, Sivam Tharamalingam did not overrule the rejection of constructive notice/knowledge in Doshi; and

(g) the rejection of constructive notice/knowledge is in consonance with the conclusiveness of RDT principle, indefeasibility of registered title/interest principle, mirror principle, curtain principle and private caveat procedure. If otherwise:

(i) *the RDT is no longer conclusive and RDT does not mirror all registered titles/interests and claims (by way of entry of private caveats); and*

(ii) *parties have to go beyond land searches and RDT to inquire regarding all*

proposed dealings of titles/interests. In other words, the curtain principle is no longer applicable. (Emphasis added.

K1 Did the plaintiff have actual notice/knowledge of fraud (chargors/developer)?

[53] Firstly, a person can only be a 'party' to a fraud of another person if the person has actual notice/knowledge of the fraud.

[54] As explained in *Maysie Long*, the ordinary meaning of the term 'privy' in s 340(2)(a) of the NLC requires the four interveners to prove on a balance of probabilities that the plaintiff had actual notice/knowledge the fraud (chargors/developer) before the execution/registration (third party charge).

[55] We have no hesitation to decide that the plaintiff had no actual notice/knowledge the fraud (chargors/developer) before the execution/registration (third party charge). The plaintiff's actual notice/knowledge:

(1) of the existence of the trust;

(2) of the fact that the two burial lots are part of the subject matter of the trust; and

(3) that the chargors were co-trustees of the trust,

cannot be tantamount to the plaintiff's actual notice/knowledge of the fraud (chargors/developer) before the execution/registration (third party charge).

K2 Whether plaintiff had constructive notice/knowledge of fraud (chargors/developer)

[56] The following appellate cases (in chronology) had consistently held that the phrase 'party or privy' in s 340(2)(a) of the NLC cannot include constructive notice/knowledge of the fraud in question:

(1) the judgment of the Federal Court delivered by Gill CJ (Malaya) in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, at p 88 (cited in the Court of Appeal's judgment in *Maysie Long*);

(2) in the Federal Court case of *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, at pp 82, 83, 84 and 85, Abdul Hamid FCJ (as he then was) decided as follows:

> The facts not in dispute are carefully set out in the written judgment of the learned judge. The first respondent Ngan Kim Yong (chargor) the registered proprietress of the said land executed two separate charges over the said land in favour of the appellant on February 4, 1970 and March 10, 1970 respectively to secure the repayment of two loans of $90,000 and $20,000 on

March 17, 1971. *Both charges were registered.*

Notice in Form 16E under s 255 of the National Land Code demanding payments of both loans was given on February 17, 1971. The chargor failed to comply with it. *There upon the chargee applied for an order for sale of the said land* and obtained an order in default of appearance. The order was however set aside upon successful application by the second to seventh respondents (the respondents) that they be joined as co-respondents.

The appellant's application was again heard on September 11, 1972 and an order for sale was granted. On August 20, 1973, on appeal the Federal Court set aside the order and further ordered that the case be remitted back to the High Court for the application to be heard in open court. It was heard on May 14, 1981. The application was dismissed.

It is also not in dispute that the chargor was a land developer. For consideration he entered into an agreement with each of the respondents second to seventh to build houses for them. These agreements were entered into during the second half of 1966. When the respondents became aware of the charge sometime in the month of August 1970 they lodged the caveats.

The respondents opposed the appellant's application for an order for sale on the ground that the appellant had failed to make all necessary and proper inquiries both as regards the land and the building erected thereon before the execution of the charges. They contended that if proper inquiries had been made the appellant would have discovered that the chargor had entered into sale agreements with them. They also contended that the appellant ought not to have relied solely on the normal searches on the titles in the Registry of Titles which revealed no encumbrances except for a charge on each title in favour of Public Bank Bhd.

The learned judge was of the view that the appellant had not carried out sufficient investigation into the nature of the land, the subject matter of the charge. If there had been careful inquiries the appellant would have discovered that the buildings on the land had been sold to the respondents.

The learned judge held that the appellant had constructive notice of the respondents' interest in the land, as at the time the charge was executed the chargor was bound by contract to sell the land to the respondents.

The learned judge further held that the appellant's demand for sale of the land in the face of such notice is unconscionable and constituted a fraud on the respondents. It is also his finding that 'by virtue of s 340 of the (NLC) the title of the registered proprietor of the land shall not be indefeasible where there is fraud to which he is a party.' The learned judge accordingly dismissed the application.

Mr RR Chelliah counsel for the appellant raised a number of grounds which may be briefly stated as follows:

(a) *whether the appellant had constructive notice of the respondents' interest in the land (ground 1);*

(b) *whether the demand for sale by the appellant in the face of the notice was*

unconscionable and constituted a fraud: was the appellant a party to the fraud? (grounds 2, 3 and 4);

(c) *whether the purchase agreement conferred upon the respondents equitable title or merely equitable interest in the land (grounds 5, 6 and 7);*

(d) *whether constructive notice or constructive fraud, if any, is enough to defeat the appellant's title (ground 8).*

...

The respondents' reply to the appellant's submission that it had acted, on the face of the Register in the Registry of Titles, honestly and without knowledge of any prior interest, is that the appellant was bound and ought to have made proper inquiries as regards land and building erected thereon before negotiating. An inquiry would have led to the discovery of the building. In turn the appellant would have discovered the occupants, the agreement and the beneficial interest of the respondents. It is submitted that by reason of the appellant's failure to make such inquiries or alternatively, of its deliberate omission to do so for purpose of avoiding notice of these matters, it should be deemed to have had constructive notice of the sale agreements and the beneficial fights of the purchasers thereunder.

It is also submitted that at the date of the execution of the charges the appellant was a party or privy to the fraudulent acts committed by the chargor. Furthermore the conduct of the appellant amounted to fraud by reason of which its rights, title and interest in the said land are defeasible.

...

We now examine the respondents' case. It would seem to us that their case depended on whether there was fraud within the meaning of (s 340(2) of the NLC). It was founded on the basis of constructive fraud alleging that the appellant had constructive notice of their prior interests. On the material before the Court the learned judge did conclude that the appellant had constructive notice of the respondents' interest in the land. The appellant's contention however is that mere constructive notice is insufficient. There must be actual fraud to defeat a person of his title or interest.

...

... The law is therefore settled that while (s 340(1) of the NLC) makes it abundantly clear that the title or interest of a registered proprietor which includes a chargee shall be indefeasible, such title or interest, however, by reason of (s 340(1) of the NLC), shall not be indefeasible in a case of actual fraud involving, to borrow the words used in Assets Company Ltd v Roihi quoted: 'dishonesty of some sort, not what is called constructive or equitable fraud'.

It is also to be noted that although under section 197 of the Land Transfer Act 1915 (New Zealand) there is provision to the effect that 'the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.', we are nevertheless of the view that 'fraud' as used in s 340 of the National Land Code, despite the absence of a provision equivalent to that of section 197 of the Land Transfer Act 1915 (New Zealand), must be actual fraud and mere

knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud within the meaning envisaged by s 340.

...

Moving closer home, our courts in Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 *held that 'the doctrine of constructive notice is inapplicable to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration and the court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land'.*

...

To prove fraud the court must be satisfied that the circumstances in which the appellant obtained registration of the charge were such that they constituted fraud. The onus is on the respondents to establish fraud of the chargor (first respondent) to which the appellant was a party or privy and it ought to have been committed prior to or at the time of registration of the charge. The fraud complained of must be that which resulted in registration of the chargee, ie the fraudulent party. And to render the interest of the registered owner of the charge defeasible the fraud must be brought home to him. (Emphasis added.)

(3) Edgar Joseph Jr FCJ had delivered the following judgment of the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, at pp 525 to 527 and 528:

In our view, in order to answer this question, it is only necessary to consider what would have happened had the transfers of the disputed properties in favour of the Intervener/Purchaser been duly registered and an attempt were made by the Family Company to challenge the registered title of the Intervener/Purchaser. In such a situation, the Father and his faction could only succeed by establishing any one of the exceptions to indefeasibility provided under s 340(2) of the (NLC), the only relevant one being s 340(2)(a) of the (NLC), which provides that in any case of fraud to which the person or body was a party or privy, the title or interest of such a person or body shall not be indefeasible.

We now turn to consider some of the cases where the meaning of 'fraud' under s 340(2)(a) was discussed, with the admonition that whether fraud is proved will depend on the particular circumstances of each case.

The Privy Council case of Assets Co Ltd v Mere Roihi & Ors [1905] AC 176 *(per Lord Lindley) is generally accepted in all Torrens jurisdictions as correctly laying down the definition of fraud, namely that the word means 'actual fraud or dishonesty of some sort, not what is called constructive or equitable fraud'.*

And, the following passage in the judgment of Lord Lindley in Asset Co Ltd v Mere Roihi at p 210 requires courts to make an assessment of the conduct of the registered purchaser in each case to see whether it amounts to fraud in the sense of dishonesty:

... Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming

> under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.
>
> ...

In Waimiha Sawmilling Co (In liquidation) v Waione Timber Co Ltd, ...

...

The litigation ultimately resulted in favour of the appellant company, with damages against H. Damages proving unavailing, the company sought to have the transfer set aside on the ground that the taking of title in the face of pending litigation, and with knowledge of it, amounted to actual fraud on the part of the respondent. Both the Supreme Court of New Zealand and the Privy Council rejected this plea.

Waimiha Sawmilling's case is a good illustration of the proposition that the effect of notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's title.

In the course of his judgment, Lord Buckmaster speaking for the Board, after referring with approval to the definition of fraud laid down by Lord Lindley in Assets Co, said this (at pp 106–107):

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. *The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.*
>
> ...

However, negligence per se does not amount to fraud (see Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd & Anor [1992] MLJU 90; [1993] 2 CLJ 199). *The case of Bunt v Hallinan* (1985) 1 NZLR 450 *(CA) shows that a solicitor's advice given to a purchaser that the purchaser could proceed with a transaction and that without such advice the purchaser would not have thus proceeded, could be most material in determining whether an allegation of fraud has been substantiated.* (Emphasis added.)

A

It is to be noted that when the Federal Court decided *Pekan Nenas Industries*, the Federal Court is our apex court; and

(4) the Court of Appeal case of *Maysie Long*, at (72(4)(d) to (g)).

B

[57] In view of the appellate cases cited in the above para 56, the four interveners cannot rely on constructive notice/knowledge to oppose this appeal. Consequently, the learned High Court judge erred in law when she decided that the plaintiff had not exercised due diligence to ascertain the status C of the subject matter of the third party charge before the registration of the third party charge (High Court's fourth legal error).

[58] In any event, due to the evidence and reasons stated in the above sub-paras 38(3)(c)(i) to (iii) and (d), it is clear that the plaintiff could not have D constructive notice/knowledge of the fraud (chargors/developer) in this case.

K3 Does s 340(2)(a) of the NLC apply to negligence of a party who has been registered as proprietor or holder of interest in land?

E

[59] As decided by the Federal Court in *Pekan Nenas Industries*, at p 528, the negligence of the plaintiff, if any, could not be tantamount to the fact that the plaintiff was 'party or privy' to the fraud (chargors/developer). If we have accepted the submission of the learned counsel for the four interveners that negligence of the plaintiff was sufficient in itself to amount to being 'party or F privy' to the fraud (chargors/developer), this will not only be contrary to the clear words of s 340(2)(a) of the NLC but will also undermine, if not defeat, the principle of indefeasibility of registered titles and interest as embodied in ss 92(1) and 340(1) of the NLC.

G

[60] In this case, the plaintiff had relied on the professional services and advice of the plaintiff's charge documentation solicitors — please refer to the above sub-para 38(3)(d). In such circumstances, the plaintiff was not negligent in this case.

H

L. HAD FOUR INTERVENERS PROVEN 'CAUSE TO THE CONTRARY' IN THIS CASE?

[61] Section 256(3) of the NLC provides as follows:

I

s 256(3) *On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.* (Emphasis added.)

[62] In deciding a charge action under s 256(3) of the NLC, the following

approach has been adopted by the High Court in *Malaysian Trustees Bhd v Pilecon Engineering Bhd* [2019] 11 MLJ 537, at [18]:

[18] Based on my understanding of the relevant NLC provisions and case law, I adopt the following approach to decide this OS:

(1) *a registered charge is indefeasible under the second limb of s 340(1) of the NLC. …*

(2) *the court should ascertain the terms and conditions of the charge agreement between the chargor and chargee. In this regard, I highlight ss 243 and 253(1) of the NLC as follows:*
…

(3) *there must be a breach of the charge agreement by the chargor (chargor's breach) — please see the Supreme Court's judgment delivered by Gunn Chit Tuan SCJ (as he then was) in Nira Sdn Bhd v Malayan Banking Bhd* [1990] 1 MLJ 110*, at 111–112;*

(4) *when there is a chargor's breach, the chargee shall serve a notice to the chargor to remedy the chargor's breach in Form 16D (please see s 254(1)(a) to (c) of the NLC) or Form 16E (please refer to s 255(1) of the NLC) within one month of the date on which Form 16D or Form 16E is served — Nira, at p 112;*

(5) *if the chargor's breach is not remedied within the time stipulated in Form 16D or Form 16E:*

(a) the entire sum secured by the charge shall become due and payable to chargee (s 254(3)(a) of the NLC (for Form 16D)); and

(b) the chargee may file a charge action and apply for an order for sale of the charged land (s 254(3)(b) of the NLC (for Form 16D) and s 255(1) of the NLC (for Form 16E));

(6) the charge action should comply with O 83 of the Rules of Court 2012 ('the RC') — *Low Lee Lian*, at p 88. This is clear from s 256(2) of the NLC which provides that a charge action 'shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure'.
O 1A of the RC provides that all rules in RC (including O 83 of the RC) shall be administered with regard to the 'overriding interest of justice'. Any non-compliance with O 83 of the RC may be cured by the court under O 2 r 1(3) of the RC if such a non-compliance has not caused any injustice to the chargor;

(7) *once the chargee has fulfilled the above sub-paragraphs (3) to (6), the chargor has the burden to satisfy the Court that there is a 'cause to the contrary' within the meaning of s 256(3) of the NLC and consequently, the Court should not order a sale of the charged land. I rely on the following opinion of the Privy Council delivered by Lord Oliver in Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457*, at 460 (an appeal from Malaysia):*

Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale

unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly. (Emphasis added.); and

(8) *according to Low Lee Lian, at p 82–85, there are three categories of 'cause to the contrary' as follows:*

(a) *the charge is defeasible under s 340(2)(a) to (c) and (4)(b) (first Category);*

(b) *the chargee has failed to comply with the conditions precedent for the filing of a charge action (second Category); and*

(c) *an order for sale of the charged land is contrary to a rule of law or Equity (third Category).*

If the chargor cannot discharge the onus to satisfy the court of any one of the first, second or third Category, the court 'shall' order the sale of the charged land under s 256(3) of the NLC. (Emphasis added.)

[63] In this appeal, we are satisfied that:

(1) the third party charge is valid and indefeasible under s 340(1) of the NLC — please refer to the above Parts I to K;

(2) the breach (third party charge) had occurred;

(3) the plaintiff had served Form 16D on the chargors and there was no dispute regarding the chargors' non-compliance (Form 16D); and

(4) the charge action complied with O 83 of the Rules of Court 2012.

In view of the fulfilment of the above matters, the chargors and four interveners (not the plaintiff) have the legal and evidential burden to satisfy the court of the existence of 'cause to the contrary' in s 256(3) of the NLC — please refer to the Privy Council's opinion delivered by Lord Oliver in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457, at p 460.

[64] According to the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, at pp 82 to 85, there are three categories of 'cause to the contrary' ('three categories (*Low Lee Lian*)'), namely:

(1) the charge is defeasible under s 340(2)(a) to (c) and (4)(b) ('first category (*Low Lee Lian*)');

(2) the chargee has failed to comply with the conditions precedent for the filing of a charge action ('second category (*Low Lee Lian*)'); and

(3) an order for sale of the charged land is contrary to a rule of law or equity ('third category (*Low Lee Lian*)').

[65] With respect to the learned counsel for the four interveners, the court cannot dismiss a charge action under s 256(3) NLC on the ground of public policy and/or unjust enrichment. Our reasons are as follows:

(1) until the Federal Court's judgment in *Low Lee Lian* regarding the three categories (*Low Lee Lian*) is extended by our apex court to include public policy and/or unjust enrichment as 'cause(s) to the contrary' within the meaning of s 256(3) of the NLC, the High Court and Court of Appeal cannot rely on public policy and/or unjust enrichment to dismiss charge actions; and

(2) an extension of the three categories (*Low Lee Lian*) will:

(a) undermine the principle of indefeasibility of registered charges under s 340(1) of the NLC; and

(b) render nugatory the security interest of chargees (in the form of charges) when the chargees grant loans and banking facilities. This will have adverse repercussions for banks and development finance institutions in this country which lend money and extend banking facilities based on the security of charges registered under the NLC. We rely on the following judgment of the Federal Court in *Low Lee Lian*, at p 87 to 88:

> *As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale*. It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under s 256(3) of the (NLC). An allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale.
>
> *We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s 256(3) of the (NLC). But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of the security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s 256(3) of*

> *the (NLC) liberally, then, institutional lenders would lose confidence in their right to realize their security through an order for sale. Financial institutions would then become reluctant to lend money to bona fide entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.* (Emphasis added.)

Premised on the above reasons, the learned High Court judge fell into error in deciding that the third party charge was contrary to public policy ('High Court's fifth legal error').

[66] It is to be noted that the plaintiff had granted in full the OD facility to the developer. The plaintiff could not be said, by any stretch of imagination, to have been unjustly enriched in this case by the breach (third party charge). Indeed, the plaintiff is also a 'victim' of the fraud (chargors/developer) in this case.

[67] As explained in the above Parts I to K, we are firmly of the view that an order for sale of the 17 lots is not contrary to any rule of law and/or equity. On the contrary, the four interveners are estopped in this case from denying the validity of the third party charge — please refer to the above para 38. There is no room to apply the three categories (*Low Lee Lian*) in this case. Accordingly, the learned High Court judge committed a legal error in deciding that an order for sale of the 17 lots was contrary to the rule of law and/or Equity ('High Court's sixth legal error').

[68] In any event, we are not satisfied that the four interveners had proven on a balance of probabilities the existence of any 'cause to the contrary' in s 256(3) of the NLC so as to dismiss the charge action.

M. OUTCOME OF THIS APPEAL

[69] Premised on the above evidence and reasons, in particular the High Court's first to sixth legal errors, we are constrained to:

(1) allow this appeal;

(2) set aside the High Court's decision; and

(3) make an order in terms of the charge action.

[70] We order no costs for this appeal as well as for the proceedings in the High Court. This exercise of discretion is made pursuant to s 70 of the Courts of Judicature Act 1964 read with rr 54 and 96 of the Rules of the Court of Appeal 1994 because the four interveners had acted altruistically in this case in

the interest of the Hindu community in Jelutong.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh